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In The

Supreme Court of the United States

October Term, 1996

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IN THE MATTER OF JOSEPH F. GAZZA,

Petitioner,

v.

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

REPLY PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	*ii*
ARGUMENTS IN REPLY	2
POINT I	
THE NEW YORK COURT OF APPEALS HAS ESTABLISHED A "BRIGHT-LINE" RULE THAT NO LANDOWNER MAY CLAIM AN UNCONSTITUTIONAL TAKING OF HIS PROPERTY IF THE LAWS OR REGULATIONS THAT ACCOMPLISH THE TAKING WERE IN EFFECT AT THE TIME HE TOOK TITLE; THIS RULE WARRANTS REVIEW BY THIS COURT	2
POINT II	
THE NEW YORK COURT OF APPEALS HAS CONCLUDED THAT THERE IS NO "CATEGORICAL TAKING" OF PROPERTY WHEN THE PROPERTY IS DEPRIVED OF ITS ESSENTIAL AND LAWFUL USE AND IS THEREBY REQUIRED TO BE LEFT SUBSTANTIALLY IN ITS NATURAL STATE; THIS HOLDING, WHICH IS IN CONFLICT WITH THIS COURT'S HOLDING IN *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL*, 505 U.S. 1003 (1992), WARRANTS REVIEW BY THIS COURT	6
CONCLUSION	9

TABLE OF AUTHORITIES

CASES

Anello v. Zoning Board of Appeals of Village of Dobbs Ferry,
1997 WL 68232 (NY Feb. 18, 1997) ..... 2n.

Basile v. Town of Southampton,
1997 WL 68581 (NY Feb. 18, 1997) ..... 2n.

Hunziker v. State,
519 N.W.2d 367 (Iowa 1994) 5

Kim v. City of New York,
1997 WL 68593 (NY Feb 18, 1997) ..... 2n.

K & K Construction v. Department of Natural Resources,
217 Mich. App. 56, 551 N.W.2d 413 (Ct. App. Mich., 6/4/96) 5

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) .....3, *passim*

Nollan v. California Coastal Commission,
483 U.S. 825 (1987) 3, 4

Preseault v. United States,
100 F.3d 1525 (Fed. Cir. 1996) 3, 4

SUPREME COURT RULES

Rule 15(6) 1

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IN THE MATTER OF JOSEPH F. GAZZA,

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-against-

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REPLY ON PETITION FOR WRIT OF CERTIORARI

The Petitioner, Joseph F. Gazza, pursuant to Rule 15(6) of the Rules of the Court, respectfully submits this reply brief in response to the "Respondent's Brief in Opposition to the Petition for Writ of Certiorari," dated June 25, 1997, and respectfully prays that a writ of certiorari issue to review the opinion and order of the Court of Appeals of the State of New York, entered in the above-entitled proceeding on February 18, 1997.

ARGUMENTS IN REPLY

POINT I

THE NEW YORK COURT OF APPEALS HAS ESTABLISHED A "BRIGHT-LINE RULE THAT NO LANDOWNER MAY CLAIM AN UNCONSTITUTIONAL TAKING OF HIS PROPERTY IF THE LAWS OR REGULATIONS THAT ACCOMPLISH THE TAKING WERE IN EFFECT AT THE TIME HE TOOK TITLE; THIS RULE WARRANTS REVIEW BY THIS COURT

In Mr. Gazza's case, and in three other cases decided the same day[1], the New York Court of Appeals established a bright-line rule that regulatory enactments, when made, become part of the State's "background law," inhere in the owner's title, and deprive subsequent owners of the right to assert taking claims based on the effects of such regulatory enactments. In fact, this bright-line rule, which purportedly involves an examination of the claimant's "title," is the primary basis used by the New York Court for rejecting Mr. Gazza's taking claim (see at 9a-14a[2]). The Court held that its new bright-line rule was "dispositive" of Mr. Gazza's claim (14a).

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[1] *Anello v. Zoning Board of Appeals of Village of Dobbs Ferry*, 1997 WL 68232 (NY Feb. 18, 1997); *Basile v. Town of Southampton*, 1997 WL 68581 (NY Feb. 18, 1997); and *Kim v. City of New York*, 1997 WL 68593 (NY Feb. 18, 1997).

[2] As in Mr. Gazza's petition to this Court, numbers followed by the suffix "a" refer to pages of the Appendix annexed to Mr. Gazza's petition.

So universal was the potential application of the Court's bright-line rule, and so dramatic was its potential effect upon the "alienability" of property throughout New York State, that Judge Wesley of the New York Court wrote a concurring opinion in which he specifically rejected the rule promulgated by the majority (see at 21a-22a).

For the Respondent DEC to argue, in Point I of its opposition brief, that the New York Court did not, in fact, determine that adoption of a regulation affecting property, followed by a transfer of the property, deprives the subsequent owner of a regulatory taking claim, is specious.

The New York rule established in Mr. Gazza's case -- which precludes a landowner who acquires property after the promulgation of a regulatory enactment from asserting that the enactment effects a taking of the property -- is at variance with this Court's decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the decisions of Courts in other States, and the decision of the United States Court of Appeals for the Federal Circuit in *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996).

What is particularly significant about the New York Court's decision is that it recasts this Court's decision in *Lucas*, *supra*, to justify the new bright-line rule. Specifically, the Court of Appeals "paraphrases" this Court's "bundle of rights" language in *Lucas* in a manner that defeats, rather than preserves, landowners' taking rights. It does so by proclaiming that, under *Lucas*, a landowner acquires not only a "bundle of rights" but a

"bundle of limitations" (see at 10a). The "limitations" to which the Court refers are those regulatory enactments that, over time, progressively diminish the landowner's property rights. As stated by the New York Court:

> ". . .Petitioner cannot base a taking claim upon an interest he never owned. The relevant property interests owned by the petitioner are defined by those state laws enacted and in effect at the time he took title. . ." (14a)

Thus, in the understanding of the New York Court, the Constitution does not protect private property rights from governmental intrusion, but affirmatively allows the States to "define" -- and thereby chip away -- such rights through successive regulatory enactments. This notion is contrary to the most basic Constitutional principles, and should be examined and reversed by this Court.

The DEC's attempt, at Page 11 of its opposition brief, to distinguish the rulings in Footnote "2" of this Court's decision in *Nollan* and the Federal Circuit's decision in *Preseault* on the basis of a "subtlety" that this Court supposedly recognized in *Lucas*, is novel[3] and misguided. Neither this Court, in *Nollan*, nor the Federal Circuit, in *Preseault*, suggest that their rulings -- which afford landowners the same rights possessed by their predecessors to assert taking and other claims -- apply only in the limited circumstance where regulation affects the "possessory interest" of landowners to exclude others from their property.

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[3]The DEC's argument was not raised in the Courts below, and does not appear in any of the decisions of the New York Courts.

The DEC's brief underscores the need for a ruling by this Court. What is clear from the cases cited by Mr. Gazza (such as *K & K Construction, Inc. v. Dept. of Natural Resources*, 217 Mich. App. 56, 551 N.W.2d 413 [Ct. App. Mich., 6/4/96]), and the additional cases cited by DEC (such as *Hunziker v. State*, 519 N.W.2d 367 [Iowa 1994]), is that Courts throughout the United States are reading this Court's decision in *Lucas* in widely disparate ways. In particular, some Courts are interpreting *Lucas*, and its discussions of a landowner's "bundle of rights" and the "background principles of the State's law of property and nuisance," as meaning that every State regulatory enactment inheres in a landowner's title, and redefines and diminishes that title, with the result that subsequent owners are barred from asserting taking claims. It is essential that this Court revisit *Lucas*, and provide guidance for the lower courts interpreting that case and reaching different results, with varying and sometimes cataclysmic effects upon landowners such as Mr. Gazza.

Finally, at Page 12 of its opposition brief, the DEC acknowledges that the New York Court has taken "a different view" of the "scope of claims after a property transfer," and suggests that there is nothing wrong with New York landowners having diminished constitutional expectations. This argument violates the concept of federalism. There is no reason why a citizen of New York, such as Mr. Gazza, should have weaker rights under the Federal Constitution than citizens of other States.

POINT II

THE NEW YORK COURT OF APPEALS HAS CONCLUDED THAT THERE IS NO "CATEGORICAL TAKING" OF PROPERTY WHEN THE PROPERTY IS DEPRIVED OF ITS ESSENTIAL AND LAWFUL USE AND IS THEREBY REQUIRED TO BE LEFT SUBSTANTIALLY IN ITS NATURAL STATE; THIS HOLDING, WHICH IS IN CONFLICT WITH THIS COURT'S HOLDING IN *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL*, 505 U.S. 1003 (1992), WARRANTS REVIEW BY THIS COURT

In Point I of its brief, the DEC relies heavily upon its own appraiser's ascription of an $80,000 "value" to Mr. Gazza's property, which was discussed in the opinions of the Courts below. The DEC asserts that Mr. Gazza's alleged failure to "challenge" or "controvert" this value somehow requires this Court to deny Mr. Gazza's petition for writ of certiorari.

Initially, it should be noted that Mr. Gazza vigorously contested the validity of the DEC's $80,000 value in the New York Courts, since that alleged value was based on the false premise that Mr. Gazza's property, although rendered unusable by the DEC for its essential and only legal use under zoning -- i.e., a single-family residence -- could nonetheless be put to certain nonhabitable recreational uses. Mr. Gazza demonstrated in the New York Courts that such nonhabitable recreational uses were not legal under the zoning of Mr. Gazza's

property.[4]

In any event, the $80,000 "value" the DEC placed before the New York Courts is irrelevant to the issues presented to this Court for review. As noted by the New York Court of Appeals (see at 17a), diminution in property value, however serious, is not the measure of a taking. Rather, as this Court confirmed in *Lucas*, *supra*, in the absence of a "physical invasion" of property by government, the taking analysis focuses on the "uses" of property that are allowed under the challenged regulatory restriction. If regulation deprives property of all economically "beneficial" or "productive" use -- typically by requiring the property to be "left substantially in its natural state" -- then there has been a "categorical" taking of the property (see *Lucas*, 505 U.S. at 1015 and 1018).

There is no dispute that Mr. Gazza's property is zoned for use as the site of a single-family residence and that the parcels surrounding Mr. Gazza's property are actually developed with substantial residences (see aerial photographs reproduced at 99a and 100a). There is also no dispute that the DEC's restrictions preclude Mr. Gazza from using his property for a residence and require the property to remain substantially in its natural state -- i.e., as a vacant parcel surrounded by houses, as it appears in the

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[4]In fact, the New York Court of Appeals expressly found that the DEC's hypothetical uses require a variance -- a variance is necessary to legitimize an illegal use (see at 4a):

> "Because the property was located in a residentially-zoned area, none of the uses suggested by the ALJ and adopted by the DEC were allowable without a variance from the Town's [sic] Zoning Board. . ."

aerial photos at 99a and 100a.

It is significant that neither the New York Courts nor the DEC provide any finding or explanation of how the recreational use the DEC would permit for Mr. Gazza's property is in any way economically "beneficial" or "productive." An alleged use that is not economically productive is no use at all under this Court's *Lucas* analysis.

Under all these circumstances, the wetlands restrictions, which deprive Mr. Gazza's property of any economically beneficial or productive use and require the property to remain substantially in its natural state, effect a categorical taking of Mr. Gazza's property under *Lucas*.

The DEC's argument that the alleged $80,000 value of Mr. Gazza's property, based on fictitious and illegal uses, somehow precludes Mr. Gazza's taking claim, and the New York Court of Appeals' emphasis of the supposed recreational value of Mr. Gazza's property as a secondary basis for denying Mr. Gazza's taking claim (see at 14a and 19a), serve to underscore the importance of the second issue Mr. Gazza has presented to this Court.

If government can defeat a taking claim merely by suggesting that the property in question can be employed for passive recreational use and ascribing an arbitrary value to the land based on the supposed availability of that recreational use, then *Lucas* is easily side-stepped by government, and the rights of citizens to be free from uncompensated takings are readily abrogated.

CONCLUSION

For the reasons stated above and in Mr. Gazza's petition for writ of certiorari, a writ of certiorari should be GRANTED.

Dated: July 7, 1997

Respectfully Submitted,

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